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No. 09-606

In the Supreme Court of the United States

JAVITCH, BLOCK & RATHBONE, LLP, AND GREAT SENECA FINANCIAL CORP.,
Petitioners,

v.

DELORES HARTMAN, DEBORAH L. RICE, AND UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

1. There is no "interlocutory" impediment to granting review here. BIO pp. 7, 8, 11-12, 17-19. The district court ruled on summary judgment that the evidence showed Petitioners "did, in fact, have a valid claim against [Respondents] and Exhibit A was a record generated by ... Great Seneca that accurately reflected the terms of that account." Pet. App. 38-41, 60. The Court further held the statement, "[a] copy of the said Account is attached hereto as 'Exhibit A,'" was not literally false. Pet. App. 38-41, 60. The Sixth Circuit reiterated these facts, observing the facts were undisputed.[1] There are no grounds for Respondents to show on remand[2] the state court pleadings were baseless, false or contained an "intentional misrepresentation." There is therefore, no obstacle to review by this Court. See e.g., *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 116 (2004) (reviewing appellate court's reversal of summary judgment awarded petitioners in the district court on statutory affirmative defense of fair use to claim of trademark infringement).

2. The constitutional issues are squarely presented. The Sixth Circuit understood the constitutional challenge in this case involved application of the FDCPA to literally true but

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[1] The Sixth Circuit recited verbatim a portion of the findings of fact of the district court, Pet. App. 3-6, noting that these facts were irrelevant to its disposition of the appeal. Id. at 31-32; 55-56.

[2] The law of the case and the mandate rule preclude relitigation of the issue of falsity. 18B Wright, Miller & Cooper, Federal Practice & Procedure § 4478.3 (2d ed. 2009).

potentially misleading representations in a pleading, as it held:

> A debt collector who made literally true representations in a petition that violated the FDCPA because the representations were misleading would be protected from liability by the BFE defense if the collector could show that the mistake was unintentional, made in good faith, and that the collector had procedures to avoid such a mistake.

Pet. App. 22. The clear import of the Court's holding was that imposing strict liability on debt collectors for literally true allegations in their pleadings is constitutionally permissible.

Petitioners and the United States[3] fully briefed the constitutionality of the FDCPA in the district court, which the district court declined to address. Pet. App. 50. See e.g. Hartman v. Great Seneca Fin. Corp., 2:04-CV-972 Doc. Nos. 52, 64 & 66; ROA 08-3773, pp. 86-107, 114-33, 135-45. Petitioners were prevailing parties on appeal; as such, they were free to "assert ... any ground in support of [the] judgment, whether or not that ground was relied upon or even considered by the trial court," which they did. *Dandridge v. Williams*, 397 U.S. 471, 476, n. 6 (1970). Under the rule of constitutional avoidance, the Court of Appeals only had to address the constitutional questions presented by Petitioners *if*

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[3] The United States intervened in the district court, and participated in the appeal, urging the Sixth Circuit to find the FDCPA constitutional. See e.g., Case No. 08-3773 Document. 00614746282 Filed 12/09/2008.

doing so was unavoidable, which it did. *Northwest Austin Mun. Utility Dist. No. One v. Holder,* __U.S. __, 129 S.Ct. 2504, 2517 (2009) (Thomas, J., concurring in part). Review of the constitutional issues by this Court would therefore be proper. *Citizens United v. FEC*, __U.S. __, 2010 WL 183856, 9-12 (January 21, 2010).

3. Respondents opposition makes plain that they want their cake and eat it too. In the district court, they argued that Petitioners violated the FDCPA when they allegedly "made a ***false statement of law*** about a document it attached to its complaint." Case 2:04-CV-972 Doc. No. 77 Filed 10/01/2007 Page 12 of 17, 6th Cir. ROA 08-3773 Vol 1, pg 1148 (emphasis added); Pet. App. 39. They prevailed on the appellate Court to assess what Ohio law requires when pleading an account claim, even though the Court got it wrong and ultimately declined to decide "what 'account' means under Ohio law." Pet. App. 11-12. The Court reversed the District Court's ruling on the bona fide error defense because "[t]he error made by Great Seneca and Javitch was **a mistake of law**; they represented that Exhibit A was an account in a manner that could be found to be misleading or deceptive." Pet. App. 17 (emphasis added). Now Respondents suggest that this case isn't worthy of review because it would require the Court to delve into "a disputed issue of state law." BIO p. 10.

In like fashion, they suggest that whatever the outcome of *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA* et al., Case No. 08-1200, "the district court can always consider any possible ramifications arising from this Court's opinion in *Jerman* on remand." BIO, p. 19. In *Jerman*, counsel

for Respondents argue that debt collectors should never be allowed to assert a bona fide error defense based on mistakes of law, which in this case involves the meaning of the term 'account' under Ohio law. If making a potentially misleading statement of state law in a petition is actionable under 15 U.S.C. §§ 1692e, 1692e(10) or 1692f, and this Court reverses *Jerman*, Petitioners will have no ground to left to stand on, as the availability of a bona fide error for a mistake of law hangs in the balance in *Jerman*. Under both the mandate rule and the law of the case, allowing the Sixth Circuit's decision to stand in this case could expose Petitioners to absolute liability should this Court reverse *Jerman*. If *Jerman* is affirmed, the first question presented will nonetheless remain unanswered to the extent it raises issue of the constitutionality of the bona fide error defense as applied under 15 U.S.C. § 1692k(c). Pet. § II(A).

Further, during oral argument in *Jerman*, Petitioner's counsel, Mr. Russell, suggested that, as applied to litigation, Congress likely intended the FDCPA's interpretation to be reigned in under the *Noerr-Pennington* doctrine, rather than by an expansive, legal-error inclusive, interpretation of the bona fide error defense:

> I should also mention, Justice Breyer, to the extent there are some really intractable problems with respect to the act application to attorneys, there -- there is ongoing litigation in the lower courts about the Noerr-Pennington doctrine about how the constitutional implications of regulating in-court

> activity apply to the Court's interpretation of the statutory provisions. And again, I think it's more likely that that is the solution Congress would have intended, an interpretive solution –
>
> ...
>
> JUSTICE BREYER: Okay. But then what --how -- but I still can't figure out how we get this thing to work here, and -- and you just came up with a new idea.
> MR. RUSSELL: Well, no. It's -- again, it's the same idea, that you construe the provisions in a way that avoid the most troublesome applications of it to attorney conduct. ...

Transcript of Argument, *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA* et al. Case No. 08-1200, p. 21, 22, reprinted online at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-1200.pdf.

Here, Respondents' Counsel points out that every court to have considered limiting the application of the FDCPA as applied to litigation under the First Amendment and the *Noerr-Pennington* doctrine, has rejected this approach. BIO 9; see also e.g. *Berg v. Merchants Ass'n Collection Div., Inc.*, 586 F.Supp.2d 1336, 1345 (S.D. Fla. 2008); *Mark v. J.C. Christensen & Associates, Inc.*, Unreported Case. No. 09-100, 2009 WL 2407700, 7-9 (D.Minn. August 4, 2009); *Gallagher v. Gurstel, Staloch & Chargo, P.A.*, 645 F.Supp.2d 795, 804 (D. Minn. 2009).

a. It is largely because of *Heintz v. Jenkins*, 514 U.S. 291 (1995) that the difficult constitutional questions arise in this case, and its meaning is clearly within the scope of the questions presented. Invariably, *Heintz v. Jenkins* is cited as a cornerstone underlying the rationale in cases extending the FDCPA to state court litigation and for rejecting the *Noerr-Pennington* doctrine in this context. Pet. App. 19-21; see also *Pepper v. Routh Crabtree, APC*, 219 P.3d 1017, 1023 (Alaska 2009); *Donohue v. Quick Collect, Inc.*, __ F.3d. __, 2010 WL 103653, 5 (9th Cir. 2010). Petitioners respectfully submit that *Heintz v. Jenkins*, should be revisited and reversed, limited or eclipsed by the application of the *Noerr-Pennington* doctrine, when the FDCPA is applied to a lawyer's litigation conduct.

i. The cornerstone on which *Heintz* rested was the spurious conclusion that "[i]n ordinary English, a lawyer who regularly tries to obtain payment of consumer debts through legal proceedings is a lawyer who regularly "attempts" to "collect" those consumer debts. See, e.g., Black's Law Dictionary 263 (6th ed. 1990) ('To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings')." *Heintz*, 514 U.S. 291, 294. Strikingly, the definition of "collect" was omitted from both the Seventh (1999), and Eighth (2004) edition of Black's Law Dictionary. The reason for its omission can be gleaned from the fact that the definition was incorrect. See Black's Law Dictionary, preface pp. x-xi (7th ed. 1999). The definition of "collect" relied on in *Heintz* was purportedly drawn from a New York state court decision from 1925. Black's Law Dictionary 328 (Rev. 4th ed. 1968):

> To gather together; to bring scattered thing (assets, accounts, articles of property) into one mass or fund; to assemble.
>
> To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings. *Isler v. National Park Bank of New York*, 239 N.Y. 462, 147 N.E. 66, 68.

See also Black's Law Dictionary, p.238 (5th ed. 1979). A review of the *Isler* case reveals it neither supports a reading of the term "collect" as extending to legal proceedings, nor the proposition that a lawyer is a debt collector.

> We are of the opinion that the phrase 'failure or delay in collecting or remitting' does not cover this case. **'Collecting' is defined by Webster's Dictionary as meaning: 'To demand or obtain payment of an account or other indebtedness.'** Here was something more than failure to demand and collect an account which was due. Possession of property was turned over to the alleged debtor, and the loss was created, not by failure to collect an outstanding account, but by this neglected delivery of property to him.

Isler v. National Park Bank of New York 239 N.Y. 462, 468, 147 N.E. 66, 68 (N.Y.1925) (emphasis

added). The first stone on which *Heintz* rested its holding is therefore, demonstrably unsound.

ii. In ordinary English, a 'lawyer' does not mean the same thing as a 'debt collector,' 'litigation' is not synonymous with 'debt collection,' and the term "collect" does not include litigation. See American Heritage Dictionary, p. 260 (1973) (defining 'collector' as "a person or thing that collects . . a person employed to collect taxes, duties or other payments"); p. 742 (defining 'lawyer' as "one whose profession is to give legal advice and assistance to clients and represent them in court. . . . Synonyms: lawyer, attorney, counselor, counsel, barrister, solicitor, advocate. These nouns denote persons who practice law"); p. 763 (defining 'litigation' as "legal action or process") and p. 261 (defining 'collect' as "[t]o call for and obtain payment of: *collect taxes*...[;] to take in payments or donations").

iii. Congress used the term "collect" as contradistinguished from the term "litigation" to signify the legislation was intended to govern the communications, acts and practices undertaken by the unregulated "debt collection" industry, not litigation engaged in by lawyers. *Senate Comm. on Banking, Housing & Urban Affairs*, Markup on Debt Collection Legislation 19-32 (June 30, 1977); H. R. Rep. 94-1202, 94th Cong. (1976); H.R. Rep. 95-131, 95th Cong. (1977); S.Rep.95-382, *reprinted in* 1977 U.S.C.C.A.N. 1695 (1977).

iv. The second reason advanced by the Court in *Heintz* to support the conclusion that the Seventh Circuit was correct and that the Sixth Circuit decision in *Green v. Hocking* was wrong, was premised on the import of the 1986 amendment to the FDCPA that repealed the attorney exemption

contained in the original enactment. *Heintz*, 514 U.S. 291, 294-295. The court observed the exemption was repealed, not narrowed.

> Without more, then, one would think that Congress intended that lawyers be subject to the Act whenever they meet the general "debt collector" definition[,] ... [which includes] those who 'regularly collec[t] or attemp[t] to collect, directly or indirectly, [consumer] debts owed or due or asserted to be owed or due another.' § 1692a(6).

Id. This inference presupposes that the Act regulated litigation by debt collectors before the exemption was repealed and that the term "collect" was intended to include litigation. Neither proposition is valid.

The Court then rejected each of the three arguments advanced in support of *Heintz* that the act should be read as containing an implied exception for litigation – perceived harmful anomalous results, a statement made Congressman Annunzio after the legislation was enacted, and the FTC commentary.

v. There are additional reasons not considered by the Court in *Heintz* that demonstrate that when applying the Act to lawyers who meet the general "debt collector" definition, Congress did not have litigation in mind. *First*, the *Heintz* Court did not consider the constitutional implications raised here. *Second*, the legislative history of the Act when it was originally considered by Congress between 1975-77 was not evaluated by the Court, which shows the term "collect" did not encompass litigation. *Third*, the purpose of the 1986 amendment was not intended to

expand the scope of the FDCPA, nor does the legislative history evidence an intent to govern lawyers engaged in litigation. *Fourth*, common law privileges and immunities were not addressed in *Heintz* or abrogated by Congress when the FDCPA was enacted or amended. *Fifth*, the history of amendments made to the Act after 1986 shows that litigation was not intended to be covered by the FDCPA. *Sixth*, in light of the universe of terms of art applicable only to litigation,[4] it requires nothing short of a fantastic assumption to reach the conclusion that Congress intended the loose language of the FDCPA to govern every communication occurring in state court litigation, when Congress prohibited debt collectors from uttering "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e.

4. The remaining issues addressed in the petition fall within the scope of the question presented, because "there can be little doubt that granting certiorari to determine whether a statute is constitutional fairly includes the question of what that statute says." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 56 (2006).[5]

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[4] For example, terms such as pleadings, suit, subpoena, deposition, interrogatories, affidavits, evidence, hearings, trial, motions, affirmative defense, summary judgment, etc.

[5] Respondent argues this Case is not worthy of review because the constitutional issue in this case was presented two years ago in Javitch, Block & Rathbone, LLP v. Gionis, No. 07-805. The denial of certiorari is not a reflection of the merits of a case. *United States v. Carver*, 260 U.S. 482, 490 (1923). Moreover, Respondent Gionis died before that case was filed in this Court,

5. The constitutional question also encompasses the evidence, how the evidence is to be construed, and under what standard the evidence is to be assessed. *Citizens United v. FEC*, __U.S. __, 2010 WL 183856, 9 (January 21, 2010). The Courts clearly require this Court's guidance on how such claims are to be assessed. Pet. 18-21.

Respondents posit that the Sixth Circuit made its determination of the constitutional issues here not on the evidence, but "on the **assumption** that **a jury could find** that petitioners' statements were knowingly false," and because it "**assumed** that that Great Seneca and Javitch intentionally misrepresented that Exhibit A was an 'account.'" BIO p. 7, 10 (emphasis added).[6] At a minimum, it was error for the Court to resolve the constitutional issues without a showing that the Petitioners had in fact made intentional misrepresentations or made statements that were knowingly false. *Citizens United v. FEC*, __U.S. __, 2010 WL 183856, 41 (January 21, 2010) (Roberts, CJ, concurring).

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

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arguably abating the controversy. Pet. Case No. 07-805, pp. ii, 34.

[6] Respondents make no argument that these assumptions were grounded on the pleadings, any evidence presented, or a construction of the facts. See Pet. App. 41 (Respondents "failed to demonstrate that the statement contained in paragraph two of the state court complaint is false.").

Respectfully submitted,

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